Labour Arbitration Update

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October 1, 2015

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Session Overview

- Discipline for off-duty conduct
- Discipline resulting from social media use
  - Fraudulent use of sick leave
- Workplace harassment
- Terminating probationary employees
- Other recent developments

Discipline for Off-Duty Conduct

- Employee's off-duty conduct hot topic in news and social media over the last year
- Impact of technology on line between personal time and work time
  - Social media, cell phone cameras, YouTube, Twitter
- Inappropriate social media use can have a negative impact on an organization's reputation

Discipline for Off-Duty Conduct Onus on Employer to Show

1. Conduct harms the company's reputation or product;
2. Behaviour renders employee unable to perform duties satisfactorily;
3. Behaviour leads to refusal, reluctance or inability of other employees to work with the employee;
4. Employee is guilty of a serious breach of the *Criminal Code*, causing injury to the general reputation of the company and its employees;
5. Conduct makes it difficult for the company to properly carry out its functions of efficiently managing its work and efficiently directing its workforce.

- *Millhaven* factors
- Do not need to satisfy all the factors in order to uphold discipline for off-duty conduct

City of Toronto v. Toronto Professional Firefighters Association (TPFFA)

- 2 firefighters' offensive off-duty tweets about women were published in National Post article
- City, after conducting an investigation, terminated both firefighters
  - Actions harmed City's reputation
  - Contrary to HR policies
- Both grievors claimed they believed their tweets were private
- 2 separate arbitration awards issued – one termination upheld, other termination substituted with a 3-day unpaid suspension

City of Toronto v. TPFFA (Bowman Grievance) (November 2014 – Newman)

Facts:

- Grievor, firefighter with 2 ½ years service
- Tweets made while he was off-duty, but he identified himself as a Toronto firefighter on Twitter, with a picture in uniform
- During preliminary investigation, grievor immediately apologized in writing. Denied making additional similar offensive tweets
- Further investigation, employer found other offensive tweets
- Employment was terminated

City of Toronto v. TPFFA (Bowman Grievance) (November 2014 – Newman)

Findings:

- Arbitrator adopted the *Millhaven* test
- Revisited/modernized 4th branch of test
  - Reasonable person would consider human rights violations to be very serious misconduct, injurious to employer's reputation
  - Has the grievor been guilty of a serious breach of the *Criminal Code* or of a Human Rights Policy or *Code*, thus rendering his conduct injurious to the reputation of the Company and its employees?

City of Toronto v. TPFFA (Bowman Grievance) (November 2014 – Newman)

Findings:

- Tweets were offensive; conduct harmed the reputation of the employer and violated several policies
- Impaired grievor's ability to fulfill the complete range of responsibilities of a firefighter
- Grievor's immediate apology was given little weight. At hearing he tried to excuse, minimize and rationalize his conduct
- Rejected assertion tweets were private
- Reasonable and fair-minded person would consider that the grievor's continued employment would damage the reputation of the employer as to render employment untenable
- Termination was upheld

City of Toronto v. TPFFA (Edwards Grievance) (October 2014 – Misra)

Findings re 2nd Firefigher:

- Discharged substituted with a 3-day unpaid suspension
- Grievor's comment about women was inappropriate but it was a "one-time event; not directed at anyone in the workplace"
- Grievor had a clean disciplinary record and good performance reviews
- Grievor apologized a number of times
- While the employer had policies on use of social media, it had not publicized those policies as well as it might have done given the wide-spread use of such media

Toronto Transit Commission and ATU (October 2014 – Shime)

Facts:

- Grievor, bus driver, discharged for fraudulently claiming/accepting sick benefits, misleading management and breach of trust
- Exhausted his vacation in order to plan and celebrate his wedding
- Shortly before his extended vacation period, grievor called in sick claiming he injured his back at home
- Grievor provided medical certificate
- Facebook page indicated he was in Las Vegas on his bachelor party
- Through anonymous tip, employer viewed grievor's public Facebook page, found pictures of grievor visiting hotels, casinos, restaurants, bars, tourist attractions in Las Vegas
- Grievor tagged on his brother's Facebook post "Vegas Tonight! Can't Wait! Brother's bachelor party is gonna be fun!"

Toronto Transit Commission and ATU (October 2014 – Shime)

Findings:

- Posts evidence that grievor engaged in "blatantly intentional fraudulent behaviour"
- Situations of false sick leave claims, discharge is the appropriate penalty, subject only to mitigating factors
- Grievor showed remorse and offered to repay the sick leave he received only after he realized employer was fully aware of his misconduct
- He claimed he only went to Las Vegas at the last minute
- Arbitrator dismissed grievor's apologies
  - "after the fact remorse for losing a well-paid unionized job"
- Discharge was upheld

Practical Implications

- Evolution of technology has resulted in
  - Greater employer access to off-duty conduct of employees
  - Increased risks to organizations' reputation and business
- Address off-duty conduct in workplace policies
- Have clear policies on social media use and ensure employees are aware of the policies

Terminating Probationary Employees

- Test for arbitral review
- Lesser standard than "just cause" applicable to permanent employees
- Whether the decision to terminate is arbitrary, discriminatory or made in bad faith

GDI Services (Canada) LP and LIUNA (November 2014 – Hayes)

Facts:

- 2 probationary cleaners with previous experience summarily terminated without warning and without even a verbal explanation
- Collective agreement provided
  - Parties to administer agreement in a "fair and reasonable manner"
  - Probationary employees may be terminated where employee is considered to be unsuitable in the judgement of the Employer
  - Termination of probationary employee based on lesser standard … at the discretion of the Employer
  - No recourse to grievance procedure

GDI Services (Canada) LP and LIUNA (November 2014 – Hayes)

Findings:

- Employer's assessment of "suitability" or "qualifications" of probationary employees should be given "a wide berth"
- Managers "did not conduct an investigation worthy of the name"
- Managers chose to rely on unsubstantiated, second-hand information from people who did not directly supervise the grievors, "amounted to little more than patently unreliable gossip"
- Direct supervisors testified grievors "performed well and without incident throughout their probationary period"
- Grievors reinstated with seniority status and full back pay (approximately 8 months)

Practical Implications

- Terminating a probationary employee is not without risk
- Failing to conduct a thorough and proper investigation has consequences
- Respect the probationary time period set out in your collective agreement
- Failure to terminate before the deadline means the employee gains permanent status

Harassment in the Workplace

- Workplace harassment defined
  - Engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome – OHSA, OHRC
- Pattern of single, subtle incidents over time, which on their own may seem mild, e.g.
  - Eye rolling, giving angry looks, raising of voice, ignoring people, demeaning tone
- Together add up to an insidious pattern
- Intent to harass *is not* required
- Is discharged justified?

Children's Hospital of Eastern Ontario (CHEO) and OPSEU (July 2015 – Parmar)

Facts:

- Grievor, Social Worker with 14 years service, terminated for harassing coworkers
- Hospital received 2 formal complaints of workplace harassment about the grievor
- Unit Manager conducted investigation
- When investigation was complete, Unit Manager and Director of LR met with grievor and advised considering options, may be discipline
- Grievor went off on sick leave and later filed a grievance alleging harassment against Unit Manager

CHEO and OPSEU (July 2015 – Parmar)

Facts:

- Nature of allegations were broad, spoke to numerous daily interactions and cumulative effect of these interactions
- Alleged grievor would ignore co-workers and ostracize them, making them feel like they couldn't voice their views, were not working properly, or their work was of no value
- Hospital retained an external investigator to look into both complaints. Investigation report concluded:
  - Grievor's complaint was unfounded
  - Grievor harassed co-workers using a "pattern of passive-aggressive behaviours, resulting in a poisoned work environment"

CHEO and OPSEU (July 2015 – Parmar)

Findings:

- All discharge cases, 3 main issues must be addressed:

1. Whether the grievor engaged in the alleged misconduct;
2. Whether the misconduct justified dismissal; and
3. Whether, in all the circumstances, an alternative response is appropriate.

CHEO and OPSEU (July 2015 – Parmar)

Findings:

- Grievor's conduct was vexatious. Personality is not a defence to harassment
- Grievor engaged in the alleged misconduct – harassment and creating a poisoned work environment
- Significance and impact of grievor's misconduct was magnified by its "insidious and sustained nature"

CHEO and OPSEU (July 2015 – Parmar)

Findings:

- Grievor had 14 years service, clean disciplinary record and a history of positive performance appraisals
- There was just cause for discipline, but not discharge
- Reinstatement not an appropriate remedy
- No reasonable expectation that a viable employment relationship could be re-established
  - Grievor did not accept responsibility for situation she created in the workplace

CHEO and OPSEU (September 2015 – Parmar)

- Parties engaged in "final offer selection process" to determine quantum of damages
- Union's position – *Hendrickson* approach – 1.5 months/year of service (14 years) = $184,897.00
- Hospital's position – *George Brown* approach – prospective analysis, future employment with employer and other factors that may affect continued employment = $72,291.88
- Arbitrator accepted Hospital's position
- Damages calculation not meant to unduly reward employee or punish employer, but to place employee in position that best replicates actual monetary loss

Practical Implications

- Number of single incidents, on their own may seem mild, but together add up to an insidious pattern, discharge may be justified
- Fact Arbitrator did not allow the grievor to return to the workplace is significant
- Even where high threshold to prove just cause is not met, arbitrators may refuse to return an employee who has engaged in a pattern of subtle harassment
  - Similar result reached in *Peterborough Regional Health Centre and ONA* (2012 – Starkman) discussed at a previous EH breakfast seminar

Other Developments

- Repayment of settlement monies due to breach of confidentiality provisions of settlement agreement by the grievor was upheld by the Ontario Divisional Court
  - *Wong v. The Globe and Mail* (November 2014)

Questions?